

APPENDIX D: VOLUNTARY ENVIRONMENTAL DISCLOSURE POLICY

A. **PURPOSE.** This policy sets forth internal guidelines designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of state environmental laws. This policy amends, but does not supersede, Air Quality Bureau (AQB) civil penalty policy to assist NMED personnel in proposing appropriate penalties or negotiating settlements in administrative and judicial enforcement actions involving voluntary self-evaluation, disclosure, correction and prevention. This policy is consistent with the U.S. Environmental Protection Agency audit policy, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* and Small Business Compliance Policy.

B. **APPLICABILITY.** This policy is applicable to NMED AQB staff when proposing penalties and negotiating settlements in administrative and judicial enforcement actions, including enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy. This policy is not a final agency action, and is intended as guidance. It does not create any rights, duties or obligations, or defenses, implied or otherwise, in any third parties.

C. **DEFINITIONS.**

For purposes of this policy, the following definitions apply:

1. Environmental audit means a systematic, documented, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.
2. Due diligence means the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect, and correct violations through all of the following:
 - a. Compliance policies, standards, and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, and other sources of authority for environmental requirements;
 - b. Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
 - c. Mechanisms for systematically assuring that compliance policies, standards, and procedures are being carried out, including monitoring and auditing systems reasonably designed to be effective to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
 - d. Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

e. Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards, including consistent enforcement through appropriate disciplinary mechanisms; and

f. Procedures for the prompt and appropriate corrections of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

3. Regulated entity means any entity, including a federal, state, and municipal facility, regulated under the Air Quality Control Act by NMED.

4. Violation means noncompliance with a requirement of a statute, regulation or air quality permit.

5. Voluntary means an act or action not required by statute, regulation, air quality permit, order or agreement.

D. **CONDITIONS.** The conditions for reducing civil penalties in accordance with Section E of this policy are as follows:

1. **Systematic Discovery.** The violation was discovered through an environmental audit or a systematic procedure or practice that reflects the regulated entity's due diligence in preventing, detecting, and correcting violations. When a violation is discovered through a systematic procedure or practice, the regulated entity must provide accurate and complete documentation to NMED as to how systematic procedures or practices meet the definition for due diligence;

2. **Voluntary Discovery.** The violation was identified voluntarily, and not through a legally mandated monitoring, reporting or emissions testing requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement;

3. **Prompt Disclosure.** The regulated entity voluntarily and fully discloses a specific violation in writing to AQB within 21 calendar days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, prior to (a) the commencement of a federal, state or local agency inspection, investigation or information request; (b) notice of a citizen suit; (c) the filing of a complaint by a third party; or (d) the regulated entity's knowledge that the discovery of the violation by NMED or a third person or entity was imminent:

If the regulated entity suspects that it will be unable to meet the 21 day deadline, the entity may contact AQB in writing before the 21 day period has passed to propose alternative disclosure terms.

4. **Prompt Correction and Remediation.** The regulated entity corrects the violation expeditiously and in no event later than within 60 days from the date of discovery, certifies in writing that violations have been corrected, and takes appropriate prompt measures as determined by NMED to remedy any environmental or human harm due to the violation.

If more than 60 days will be needed to correct the violation(s), the regulated entity must notify AQB in writing before the 60-day period has passed;

5. Remediation of Imminent and Substantial Endangerment. The regulated entity immediately remedies any condition that has created or may create an imminent and substantial endangerment to human health or the environment;

6. Prevention of Recurrence. The regulated entity implements appropriate measures to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts. The implementation of measures should be completed within a reasonable amount of time given the nature of the violation and type of measure;

7. No Repeat Violations. The specific violation, has not occurred more than once within the past three years at the same facility. For purposes of this section, a "violation" includes:

(a) any violation of a federal or state environmental law identified in a civil or administrative order, consent agreement, stipulated final order, conviction or plea agreement, except for violations which are determined to be without basis by a court or administrative entity with competent jurisdiction; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from the EPA or NMED;

8. Cooperation. The regulated entity cooperates and provides such information as is reasonably necessary and required by NMED to determine the applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in any further investigations into the violation and other related compliance problems of the regulated entity;

9. Written Agreement. "Where appropriate, NMED may require that to satisfy any of these conditions, a regulated entity must enter into a written agreement, stipulated final order, administrative consent order, or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required; and

10. Excluded Violations. The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to human health or the environment, or (ii) violates the specific terms of any judicial or Administrative order, or consent agreement.

E. CIVIL PENALTIES. Regulated entities will be eligible for the following adjustments in civil penalties:

1. Elimination of Gravity-Based Penalties. If a regulated entity satisfies all of the conditions of Section D, NMED will eliminate the gravity component from the penalty policy.

2. Reduction of Gravity-Based Penalties. NMED may reduce by 75% the gravity-based component of the penalty in cases in which all of the conditions in Section D.2 through 10 are met.

3. Economic Benefit. NMED retains its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage through noncompliance.

F. **HISTORY OF NONCOMPLIANCE.** NMED may exclude self-disclosed violations which meet all of the conditions in Section D.2 through 10 when determining an entity's adjustment factor for history of noncompliance under the AQB Civil Penalty Policy.

G. **CRIMINAL ACTIVITIES.** This policy does not apply to the disclosure of potentially criminal violations.

H. **NO ROUTINE REQUESTS FOR AUDITS.**

1. NMED will not request a voluntary environmental audit report to trigger a civil or criminal investigation. For example, NMED will not request an audit in routine inspections. If NMED has independent reason to believe a violation has occurred, NMED may seek any information relevant to identifying violations or determining liability or extent of harm including any existing audits.

2. With respect to federal, state, or municipal facilities, although governmental facility environmental audit reports may be accessible to the public under the federal Freedom of Information Act (FOIA) or the state Inspection of Public Records Act in certain circumstances, NMED will not utilize FOIA or the State Inspection of Public Records Act to request information from governmental agencies. NMED will apply this policy on requests for audit reports to federal, state and municipal facilities the same as it does for other regulated entities.